APPEAL NO. 010024

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 27, 2000. The hearing officer resolved the disputed issues of injury, date of injury, timely report of injury, and disability by deciding:

1. The appellant (claimant) did not sustain a compensable injury.

2. The date of the claimant's alleged injury was _____.

3. The claimant did not timely report his injury to his employer.

4. The claimant did not have disability.

The claimant filed a request for review, contending that the hearing officer erred in his resolution of all of the issues. The respondent (self-insured) responds that there is sufficient evidence in the record to support the hearing officer's decision.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The claimant testified that he felt pain in his shoulder when he was throwing boxes of meat at work. In the claimant's medical records there was a history of the claimant having shoulder problems for several months prior to this. The claimant testified that the problems he had in May were different from his prior problems. The claimant was uncertain about when the incident took place in May, although there was evidence that the incident took place sometime between Cinco De Mayo (May 5) and Memorial Day (May 29). On July 25, 2000, the claimant was informed that he might have a rotator cuff tear and this was later confirmed by MRI. The claimant testified that he reported an injury to his supervisor on July 27, 2000, although the supervisor testified that the claimant did not report an injury until August 14, 2000. The claimant underwent rotator cuff repair surgery on September 25, 2000.

The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v.

Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

A finding of injury may be based upon the testimony of the claimant alone. Houston Independent School District v. Harrison, 744 S.W.2d 298,299 (Tex. App.-Houston [1st Dist.] 1987, no writ). However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case, the hearing officer found no injury, contrary to the testimony of the claimant. The claimant had the burden to prove he was injured in the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). We cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant failed to meet this burden. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The claimant contends that the hearing officer did not have a basis for determining that the date of injury was _____, when the claimant himself did not know the date of the injury. The date of the injury is a question of fact. Based upon the evidence before the hearing officer, we do not find error in the hearing officer finding that the date of the injury was _____.

As to whether the claimant timely reported his injury, this issue also turns upon whether to give greater weight to the testimony of the claimant or of the supervisor concerning when the claimant first reported his injury. It was the province of the hearing officer as the finder of fact to weigh the evidence and resolve the conflicts in the evidence. Applying our standard of review, we find sufficient evidence to support his determination that the claimant did not timely report his injury.

Finally, with no compensable injury found, there is no loss upon which to find disability. By definition, disability depends upon a compensable injury. *See* Section 401.011(16).

The decision and order of the hearing officer are affirmed as reformed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge